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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-364.

UNITED STATES OF AMERICA,

Petitioner,

vs.

WILLIAM G. HALE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITIONER OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC.

This brief, *amicus curiae,* is filed pursuant to the rules of this court. The Solicitor General of the United States, counsel for the petitioner, and Professor Larry Ritchie, counsel for the respondent have consented to the filing of the brief. Letters to this effect have been filed with the Clerk of the Court.

INTEREST OF AMICUS CURIAE.

Americans for Effective Law Enforcement, Inc. (AELE) is a national not-for-profit citizens organization incorporated under the laws of the State of Illinois. As stated in its by-laws the purposes of AELE are:

1. To explore and consider the needs and requirements for the effective enforcement of the criminal law.
2. To inform the public of these needs and requirements to the end that the courts will administer justice based upon a due concern for the general welfare and security of law abiding citizens.
3. To assist the police, the prosecution, and the courts in promoting a more effective and fairer administration of the criminal laws.

In furtherance of these objectives AELE seeks to represent in our courts, nationwide, the concern of the average citizen with the problems of crime and of police effectiveness to deal with crime.

The interest of *amicus* in the instant case stems from the fact that if the majority opinion of the lower court is allowed to stand in this case, the result could be a perversion of the privilege against self-incrimination to the effect that a criminal defendant who takes the witness stand will have the opportunity to commit perjury, as to matters on which he previously stood mute, without challenge to his credibility on the matter by the prosecution. We believe that such a situation would be extremely detrimental to the effectiveness of law enforcement and, indeed, to the integrity of the judicial process.

ARGUMENT.

I.

THE PRIVILEGE AGAINST SELF INCRIMINATION SHOULD NOT BE PERVERTED BY PRESENTING DEFENDANTS WHO TESTIFY IN THEIR OWN BEHALF IN CRIMINAL CASES WITH THE OPPORTUNITY TO COMMIT PERJURY WITHOUT CHALLENGE TO THEIR CREDIBILITY WITH REGARD TO PRIOR SILENCE AS TO IMPORTANT ISSUES IN THE CASE.

Amicus will not reiterate the legal arguments made by the United States in the instant case, although we are in complete agreement with them and wish to associate ourselves with them. We will, however, discuss briefly that aspect of this case which we believe to be of the most crucial importance to the effectiveness of the enforcement of the criminal law and, indeed, to the integrity of the entire judicial process.

This aspect of the instant case concerns the fact that, if the reasoning of the majority judges below is to be followed, the privilege against self-incrimination embodied in the Fifth Amendment to the Constitution of the United States could become, in effect, a license for a criminal defendant to commit perjury at will while the prosecution, at the same time, is barred from making any effective challenge to it. This, in the words of Judge Wilkey, dissenting in the instant case, would result in ". . . an incredible perversion of the judicial process."[1]

Amicus has, on a prior occasion, made known to this Court its view that the restrictions upon law enforcement in obtaining legally admissible statements which are embodied in *Miranda* v. *Arizona*, 384 U. S. 436 (1966), are too rigid and inflexible and

1. 498 F. 2d 1038 (1974), at page 1049.

that they should be modified.[2] Indeed, we submit that the very rigidity and inflexibility of the language contained in a *footnote* to the *Miranda* opinion was a major factor in the decision of the majority in the instant case.[3] The instant case does not present the occasion for a full scale review of the *Miranda* decision and we will not belabor the point; we merely point out that it is the inflexibility of the *Miranda* decision which has, at least in part, caused this case to arise.

Basically, the issue here can be summarized thusly: can a suspect in a criminal case invoke, at least by implication, his privilege against self-incrimination by standing mute in the face of police interrogation and then be given the opportunity at trial to commit perjury over the issue on which he so stood mute without the prosecution having an equal opportunity to challenge the credibility of the trial testimony in question?

We emphasize the point that the issue here concerns merely the *opportunity* to commit perjury. We cannot say whether or not defendant Hale did commit perjury when he took the stand and explained his possession of a large sum of money, on which he had stood mute at the police station, by the story that he had money from his wife to buy money orders. It is precisely the fact that we cannot tell whether the defendant is telling the truth that makes the issue so important, because it then devolves upon the jury to determine whether the defendant's statement is credible or not. If the prosecution is not permitted to challenge a given statement by asking a defendant who has taken the stand whether

2. See: Brief *Amici Curiae* of Americans for Effective Law Enforcement, Inc. and the International Association of Chiefs of Police, Inc. in *Michigan* v. *Tucker*, ... U. S. ....., 94 S. Ct. 2357 (1974).

3. 384 U. S. 436 at 468, N. 37. The footnoted language in *Miranda* which the majority below found to be so compelling is as follows:

> In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation.

he said nothing about the matter on prior occasions, the jury will be denied the opportunity to accept or reject the very proper inference that an exculpatory statement made by the defendant at trial was fabricated during the interval between the time of his first questioning, when he said nothing, and the time of his trial when he takes the witness stand.[4]

If the reasoning of the majority in this case is allowed to stand the privilege against self-incrimination will have become perverted from a shield against the extortion of involuntary confessions from criminal suspects by the police into a device whereby the defendant can, with legal impunity, assert the privilege by standing mute and then testify, perhaps perjuriously, in his own behalf without the opportunity of the prosecution to challenge, by reference to the prior silence, the credibility of the defendant's assertions in his own behalf.

This "perversion of the privilege" rationale is brought into focus in the context of the instant case. Defendant had been identified by the complaining witness as one of the men who had robbed him. He was arrested and questioned by the police after being advised of his rights. He had on his person the sum of $150.00. The record is unclear as to whether the police specifically asked him about the money; the record is clear, however, that the defendant did not indicate in any manner to the police where the money came from.

The position of the defendant is summed up in an opinion of the Kansas Supreme Court, upholding a jury instruction that an inference may arise from a defendant's failure to procure testi-

4. In the instant case it is reasonable to believe that the jury, by its guilty verdict, may have made just such an adverse inference against the defendant. Indeed, the majority seems to concede this in footnote one to its opinion:

> Both appellants argue that the trial court's refusal to grant a motion for judgment of acquittal was erroneous since the testimony of the complaining witness was "inherently incredible." We find sufficient evidence to sustain the verdicts. *The question of credibility was for the jury.* (Citations omitted) (emphasis supplied) 498 F. 2d 1038 at 1039, fn. 1.

mony which would refute or explain facts and circumstances of a suspicious nature which were within the defendant's knowledge and reach:

> *"It seems to us that that clause is only a recognition of a well-understood principle of human action. The instinct of self-preservation impels one in peril of the penitentiary to produce whatever testimony he may have to deliver him from such peril. Every man will do what he can to shield himself from the disgrace of a conviction of crime, and the burden of punishment. We all know this. We all expect it. Whenever then a fact is shown which tends to prove crime upon a defendant, and any explanation of such fact is in the nature of the case peculiarly within his knowledge and reach, a failure to offer an explanation must tend to create a belief that none exists. Will not a man, who can, explain that which unexplained will stamp him a criminal and consign him to the felon's cell? The criminal law furnishes in its rules more than one illustration of this principle. The possession of recently-stolen property casts upon the possessor the duty of explaining such possession. Why? Because the fact and manner of acquiring that possession are peculiarly within his knowledge and reach, and the instinct of self-preservation will compel him to give an explanation thereof consistent with his innocence, if any such explanation exists. Other illustrations might be cited, but it is scarcely necessary. The principle itself rests in the common knowledge and conviction of all." State* v. *Grebe*, 17 Kan. 458 (1877). Cited in 2 Wigmore Sec. 285, 3rd Edition (1940).

We submit that this very commonsense rationale applies to the instant case.

We do not contend that the police could have forced the defendant to explain where he got the money. We do contend, however, that the inference of unexplained possession as described above should not be denied to the jury, in order to assess the defendant's credibility, once the defendant had taken the stand and given an exculpatory explanation of his possession of the money. Any other holding perverts the legitimate as-

sertion of the privilege into an affirmative weapon for the defendant to use in committing perjury, if he so desires, with impunity. This does nothing to serve the cause of justice and indeed it undermines the integrity of the entire judicial process.

The obvious policy reasons against permitting the privilege against self-incrimination to become so perverted are underscored by the decisions of this Court in recent years. In *Harris* v. *New York*, 401 U. S. 222 (1971), it was held that statements taken from an arrested criminal suspect in violation of *Miranda*, although inadmissible in the prosecution's case in chief, were admissible for use in cross-examination in order to challenge the credibility of the defendant who had taken the witness stand and made contradictory statements. The Chief Justice stated the Court's position with regard to the "perversion of the privilege" issue:

> *The shield provided by Miranda cannot be perverted into a license to use perjury by way of defense, free from risk of confrontation with prior inconsistent utterances.* 401 U. S. 225 at page 226.

More recently this Court again refused to allow the privilege to be perverted in *Michigan* v. *Tucker*, ... U. S. ....., 94 S. Ct. 2357 (1974). In that case the police had arrested a rape suspect and taken a statement from him in violation of the dictates of *Miranda* v. *Arizona*.[5] The suspect, Tucker, made a statement in which he gave the police a totally false alibi story to the effect that he had been hunting with one Henderson when the rape took place. Not only did Henderson not confirm Tucker's story but he was called as a witness at Tucker's trial and gave extremely damaging testimony against Tucker.

The Michigan Supreme Court affirmed Tucker's conviction;[6] however, the United States District Court for the Eastern Dis-

5. In fact *Miranda* had not been decided when Tucker was questioned; however since the statements were made pre-*Miranda* but Tucker's trial was post-*Miranda*, the *Miranda* rule applied. *Johnson* v. *New Jersey*, 384 U. S. 719 (1966).

6. 385 Mich. 594 (1969).

trict of Michigan held, in *habeas corpus* proceedings, that Henderson's testimony, which was concededly a product of Tucker's "illegal" statements, was the fruit of the poisonous tree and thus inadmissible.[7] The United States Court of Appeals for the Sixth Circuit affirmed.[8] The lower Federal Court decisions are classic examples of the perversion of the privilege theory. They held in effect that Tucker was privileged to lie to the police as much as he pleased, with complete impunity from the consequences of his lies because *Miranda* had been violated. This Court reversed, holding that the testimony of the third-party witness, Henderson, was admissible despite the fact that it was the product of statements taken from Tucker in violation of *Miranda*. Again as in *Harris, supra,* this Court refused to pervert the privilege against self-incrimination into a license for the defendant to use his own false statements to his advantage.

We submit that the holdings of *Harris* and *Tucker, supra,* should be applied in the instant case as well. Mr. Justice Brennan, dissenting in *Harris* stated his view that ". . . it is monstrous that courts should aid or abet the law-breaking police officer."[9] *Amicus* believes that it is far more monstrous and far more corrosive to the integrity of the administration of justice to aid and abet criminal defendants by giving them every opportunity to make false statements or to commit perjury with impunity from the consequences of making the false statements or of committing perjury.

For these reasons we respectfully urge that the judgment of the United States Court of Appeals for the District of Columbia Circuit be reversed.

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7. 352 F. Supp. 266 (1972).
8. 480 F. 2d 927 (1973).
9. 401 U. S. 222 at page 232.

CONCLUSION.

The holding of the lower court squarely presents an example of the perversion of the privilege against self-incrimination. Defendant was under no obligation to explain to the police why he was in possession of $150.00 at the time of his arrest for robbery, and he was so advised. But when the defendant took the witness stand at his trial and gave an exculpatory explanation for his possession of the money, the jury should not have been denied the opportunity to accept or reject any inferences it might make from defendant's prior unexplained possession.

Any other holding would present the defendant with the opportunity to commit perjury without risk of a challenge, by the prosecution, to his credibility. The teachings of this Court in *Harris* and *Tucker, supra,* are persuasive authority for the proposition that the Court will not countenance such a perversion of the privilege against self-incrimination. The holding of the United States Court of Appeals for the District of Columbia Circuit should be reversed.

Respectfully submitted,

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